ASARCO INC.

IBLA 89-260, 89-462 Decided September 21, 1990

Appeals from decisions of the Deputy to the Assistant Secretary-- Indian Affairs (Operations), Bureau of Indian Affairs, affirming orders of the Minerals Management Service requiring payment of additional mini-mum royalties for two Papago Indian mining leases and late payment charges. MMS-87-0408-IND, MMS-87-0495-IND, and MMS-88-0348-IND.

Affirmed.

1. Contracts: Construction and Operation: General Rules of Construction--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Mining: Royalties

   A settlement agreement is a contract, and the normal rules of contract construction govern its interpretation. Contracts entered into by an Indian tribe and approved by the Secretary of the Interior are subject to the same rules of interpretation applicable to contracts between private parties. Federal law, which controls the construction of Federal contracts includ-ing Indian contracts, follows the principles of general contract law.

2. Contracts: Construction and Operation: General Rules of Construction--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Mining: Royalties

   The primary function of contract interpretation is to ascertain the intention of the parties, and that intention must be gathered from the instrument as a whole, preferably giving a reasonable meaning to all parts of the instrument and ascribing to the contract language its ordinary and commonly accepted meaning. If the principal purpose of the parties in entering into the agreement is ascertainable, that purpose is given great weight in interpreting the contract. When a paragraph in a settlement agreement provides that the provisions for minimum royalties in that agreement are in addition to the minimum royalty provisions in the subject mining leases, the Minerals Management Service properly interprets that paragraph as requiring that the total mini-mum royalties due under the leases and the agreement be combined before subtracting the production royalties to calculate the amount of minimum royalties due.

APPEARANCES: Burton M. Apker, Esq., and Gerrie Apker Kurtz, Esq., Phoenix, Arizona, for appellant; Peter J. Schaumberg, Esq., Geoffrey Heath, Esq., and Howard W. Chalker, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service. 1/

OPINION BY ADMINISTRATIVE JUDGE HARRIS

ASARCO Inc. has appealed from an October 3, 1988, decision of the Deputy to the Assistant Secretary--Indian Affairs (Operations) (Deputy), Bureau of Indian Affairs (BIA), denying its appeal of orders of MMS requiring it to pay $40,869.92 in additional minimum royalties (MMS-87-0408-IND) and $15,310.35 in late payment charges (MMS-87-0495-IND) for Papago Indian mining lease Nos. 454-2-60 and 454-3-60. 2/ This appeal has been docketed as IBLA 89-260. ASARCO has also appealed from the Deputy's January 24, 1989, decision affirming MMS' demand for an addi-tional $824.85 in late payment charges for the months of November and December 1981 (MMS-88-0348-IND). 3/ This appeal has been docketed as IBLA 89-462.

ASARCO has requested that the two appeals be consolidated, and MMS concurs with that request. Because both appeals stem from MMS' assess-ment of the additional minimum royalties, we grant ASARCO's request and consolidate the two appeals for review.

Effective September 18, 1959, BIA, on behalf of the Indian landowners, and ASARCO entered into the leases allowing ASARCO to prospect for and mine minerals other than oil and gas. 4/ Both leases were issued for primary terms of 10 years and as long thereafter as the leased substances were produced in paying quantities. The leases contain identical paragraphs 4(c) which provide for the payment of minimum royalties, as follows:

1/ Counsel state that they represent the Minerals Management Service (MMS); however, the decisions that have been appealed and that they are defending are those of the Bureau of Indian Affairs.

2/ Both leases are located on the San Xavier Indian Reservation, Pima County, Arizona. Lease No. 454-2-60 encompasses 560 acres in the E½ sec. 14, and the NE¼, N½ SE¼ sec. 23, T. 16 S., R. 12 E., Gila and Salt River Meridian, while lease No. 454-3-60 embraces 1,994.37 acres described as the W½ sec. 13, the W½ sec. 24, and sec. 25, T. 16 S., R. 12 E., and sec. 30, T. 16 S., R. 13 E., Gila and Salt River Meridian.

3/ In his Oct. 3, 1988, decision, the Deputy had noted that interest had been calculated beginning January 1982, even though the underpaid min-imum royalties were first due by Oct. 31, 1981. He stated that additional interest was due for November and December 1981 and would be billed by separate invoice.

4/ ASARCO operates the leases as part of the Mission Mine Complex. The ore produced from the leases contains copper, silver, and gold. The ore is milled and sent through a flotation process where it becomes concentrate which is then smelted and refined into pure silver or gold bullion or copper rods, billets, and cathodes. See ASARCO's Statement of Reasons (SOR) filed in IBLA 89-260 at 2. ASARCO incorporated that SOR as its statement filed in IBLA 89-462.

> MINIMUM ROYALTY.--To pay, or cause to be paid, to the Superintendent for the use and benefit of the Indian landowners, at the expiration of each lease year, commencing with the fourth lease year, a minimum royalty of Four Dollars ($4), per acre, or, if there is production, the difference between the actual royalty paid during the year and the prescribed minimum royalty, if the actual royalty paid is less than the minimum royalty. Each landowner having land covered by a lease shall receive such proportion of the minimum royalty as his acreage bears to the total acreage covered by the lease.

Under these provisions, the total minimum royalty for the two leases amounts to $10,217.48 per year.

On June 16, 1970, the Papago Indians (Papagos) filed suit against ASARCO, Papago Tribe v. ASARCO, No. CIV-70-83-TUC (D. Ariz.), alleging, inter alia, failure to diligently develop the leases. On November 3, 1971, the parties entered into a Settlement Agreement, which was approved by the Secretary on November 9, 1971, accepted by the Papagos on January 27, 1972, and approved by the court on March 1, 1972.

The Settlement Agreement contained minimum royalty provisions in paragraphs V.A(2), (3), and (5):

> A(2) Commencing September 17, 1973, ASARCO shall pay in quarterly installments to the Superintendent of the Papago Agency of the BIA (herein "Superintendent") for the use and benefit of the lessors under Lease No. 454-2-60 a minimum annual royalty of THREE HUNDRED THOUSAND DOLLARS ($300,000), or the difference between the production royalty paid and such minimum royalty if the production royalty paid is less than the minimum royalty.
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> A(3) Commencing September 17, 1973, ASARCO shall pay in quarterly installments to the Superintendent for the use and benefit of the lessors under Lease No. 454-3-60 a minimum annual royalty of THREE HUNDRED THOUSAND DOLLARS ($300,000), or the difference between the production royalty paid and such minimum royalty if the production royalty paid is less than the minimum royalty.
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> A(5) The foregoing provisions for minimum royalties shall be in addition to the provisions for minimum royalties contained in Paragraph 4(c) of the mineral leases.

By letter dated February 4, 1987, MMS informed ASARCO that, based on its review of operations under the mining leases for the period of September 1979 through September 1984, it had made a preliminary determination that ASARCO had underpaid minimum royalties on the two leases by $40,869.92 during the audit period. See Appendix A. MMS indicated that ASARCO had paid the minimum royalties set forth in the Settlement Agree-ment, but had failed to pay the minimum royalties required by the lease terms, noting that the minimum royalties established by the Settlement Agreement were in addition to the minimum royalties set by the leases.

MMS asked ASARCO to review the factual data and to advise MMS of its concurrence or the specific reasons for its nonconcurrence with MMS' findings.

ASARCO responded on February 24, 1987, contending that in each year of the audit period, the actual production royalties from the leases had exceeded the minimum royalties required by the lease provisions. It concluded that, in accordance with the lease provisions, no minimum royalties were due for those years.

By letter dated July 23, 1987, MMS directed ASARCO to pay $40,869.92 in additional minimum royalties for the two leases. MMS explained that

> ASARCO underpaid the total minimum royalties required by the terms of the leases and the Settlement Agreement * * *. While ASARCO paid the minimum royalties added by the provisions of the Settlement Agreement, the Settlement Agreement established those minimum royalties in addition to the minimum royalties established by the lease terms. ASARCO did not pay the minimum royalties required by the lease terms. [Emphasis in original.]

(July 23, 1987, Letter at 1).

MMS noted that ASARCO's response to the February 4, 1987, letter addressed only the lease minimum royalties and not the total minimum royalties provided by the leases and the Settlement Agreement. MMS concluded:

> ASARCO incorrectly compared actual royalties to minimum royalty required by the leases and to the minimum royalty required by the Settlement Agreement in separate calculations. Since actual royalty exceeded the minimum royalty required by the leases, ASARCO did not pay that portion of the minimum royalty. Our review of files maintained by the Bureau of Indian Affairs, as well as the language of the Settlement Agreement, * * * indicates that minimum royalties are to be treated in total.

(July 23, 1987, Letter at 3). Accordingly, MMS ordered ASARCO to pay the additional minimum royalties, and informed it that late payment charges would be computed upon receipt of that payment.

ASARCO paid the additional minimum royalties under protest and, pursuant to 30 CFR 290.6, appealed the MMS determination to the Deputy. On October 21, 1987, MMS directed ASARCO to pay $15,310.35 in interest for the late payment of the additional minimum royalties, citing 43 CFR 3599.1. ASARCO also paid that assessment under protest and appealed it to the Deputy on the ground that the underlying additional minimum royalty determination was erroneous.

By decision dated October 3, 1988, the Deputy denied both appeals and affirmed MMS' calculation of minimum royalties. He rejected ASARCO's contention that when production royalties exceed $4 per acre, the minimum

royalty provisions of the leases become inoperative and all production royalties are fully credited against the Settlement Agreement minimum royalties. The Deputy found that ASARCO uses the first $10,217.48 in production royalties to satisfy the provisions of the leases and then applies that same amount a second time against the minimum royalties required by the Settlement Agreement. He stated that ASARCO's interpretation required $610,217.48 in minimum royalties under the leases and Settlement Agreement if no production royalties were paid, but only $600,000 in production royalties to satisfy all minimum royalties. He determined that this interpretation did not comport with the clear language of paragraph V.A(5) of the Settlement Agreement stating that the minimum royalty provisions are "in addition" to each other, and simply read the "in addition" language out of the agreement. The Deputy concluded that "[t]he correct method of calculating the minimum royalties is to add the total minimum royalties due under each lease and the Settlement Agreement, and then subtract the production royalties paid by [ASARCO] during the period" (Decision at 4). The Deputy also affirmed the late payment charges assessed against ASARCO. 5/

In its SOR, ASARCO characterizes the positions of the parties as follows:

> [MMS and the Deputy take] the position that the correct method of calculating the minimum royalties is to add the total minimum royalties due under each lease and the Settlement Agreement (i.e., $610,217.48), and then subtract the production royalties paid by ASARCO during the period. Any difference would be due as the minimum royalty.
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> It is ASARCO's position that under the provisions of Paragraph 4(c) of the Mining Leases, no minimum royalty is required if production generates a royalty of more than $4.00 per acre (although there may be minimum royalties due under the Settlement Agreement unless the production royalty also exceeds $300,000 for each lease). [Footnote omitted.]

(SOR at 4). ASARCO reiterates the arguments it made to the Deputy supporting its interpretation of paragraph V.A(5) of the Settlement Agreement.

ASARCO contends that MMS construed paragraph V.A(5) as requiring ASARCO to pay the $300,000 minimum royalty per lease set forth in the Settlement Agreement plus the $4 per acre minimum royalty established by the leases in each year in which actual production royalties do not equal the sum of the two minimum royalties, i.e., that minimum royalties under the Settlement Agreement were in addition to the minimum royalties due under the leases.

5/ By letter dated Sept. 7, 1988, MMS billed ASARCO for $824.85 in additional interest for the months of November and December 1981 for the late payment of the additional minimum royalties. ASARCO appealed this determination to the Deputy who affirmed the additional late payment charges on Jan. 29, 1989. ASARCO has requested oral argument before the Board. We find, however, that the briefs before us adequately address the issues on appeal. Therefore, we deny ASARCO's request for oral argument.

This interpretation, according to ASARCO, ignores the words "provisions for" used in paragraph V.A(5), which state that the "provisions for minimum royalty" in the Settlement Agreement "shall be in addition to the provisions for minimum royalties" found in the leases, not that the minimum royalty due under the Settlement Agreement is in addition to the minimum royalties due under the leases.

ASARCO further argues that, contrary to the Deputy's determination, its interpretation does not deny meaning to paragraph V.A(5), rather it requires consideration of the minimum royalty provisions of both the leases and the Settlement Agreement, by utilizing a two-step process. ASARCO first determines whether it must pay additional royalties under the leases. When the "actual royalty paid" exceeds $4 per acre, no minimum royalty is due under the lease provisions. ASARCO then, pursuant to paragraph V.A(5), applies the Settlement Agreement's minimum royalty provisions to determine whether such royalty is due, i.e., whether the full minimum royalty of $600,000 for both leases or "the difference between the production royalty paid and such minimum royalty" is due.

ASARCO counters the contention that it counts the first $10,217.48 in actual royalties twice by noting that the calculations under both the leases and the Settlement Agreement begin with the same figure, referred to as the "actual royalty paid" in the leases and the "production royalty" in the Settlement Agreement. It argues that MMS and BIA, by defining "production royalty" under the Settlement Agreement as the "actual royalty paid" minus $10,217.48, have inexplicably assigned different meanings to these synonymous terms.

ASARCO also asserts that its understanding that it owes more in min-imum royalties when no production occurs than when some, but less than $600,000 worth of, production occurs fully comports with the Settlement Agreement's intent to exact a penalty from it when nothing is produced. ASARCO alleges that such an additional penalty would not be necessary if it was diligently developing the leases even though the production royal-ties might not equal the $300,000 minimum royalty provided for in the Settlement Agreement. ASARCO claims that mining leases frequently provide for additional costs prior to mine development in order to encourage such development. After development, ASARCO contends, such clauses generally are no longer necessary or operative, and minimum royalty provisions then serve to spread out payments to provide for a more stable return. ASARCO concludes that it properly accounted for minimum royalties during the audit period, and the decision against it should be reversed.

In its answer, MMS agrees with ASARCO's characterization of the positions of the parties, but it challenges ASARCO's position on several grounds. MMS argues that the language of the Settlement Agreement does not support ASARCO's interpretation because that interpretation reads out the words "in addition" in paragraph V.A(5) when there is enough production royalty to cover the minimum royalty clauses in the leases. MMS contends that ASARCO's reading should not be permitted because it violates the principle that a contract should not be construed to render one part useless, meaningless, or superfluous.

MMS also suggests that ASARCO's interpretation fails to conform to the stated purpose of the agreement: to provide an additional economic incentive to ASARCO to diligently develop the leased lands so that the Papagos would receive a reasonable return for the mineral potential of the property. MMS asserts that ASARCO's reading reduces the amount of minimum royalties owed and thus reduces, although by a small amount, the incentive to develop the mine, contrary to the intent of the agreement.

MMS contends that its interpretation is consistent with that expressed shortly after the execution of the Settlement Agreement and attaches fact sheets prepared by BIA and the Papagos in 1972 indicating that under the Settlement Agreement, the Papagos would receive at least $610,200 per year in minimum royalties. MMS repeats that the terms of an agreement must be construed in a manner which gives meaning to the intent of the parties, and that in this case its interpretation conforms to that intent. MMS concludes that the Deputy's decision requiring additional royalty must be affirmed.

[1] Our task focuses on the proper interpretation of paragraph V.A(5) of the Settlement Agreement. A settlement agreement is a contract, and the normal rules of contract construction govern the interpretation of such agreements. Press Machinery Corp. v. Smith R.P.M. Corp., 727 F.2d 781, 784 (8th Cir. 1984); Airline Stewards & Stewardesses Ass'n v. Trans World Airlines, 713 F.2d 319, 321 (7th Cir. 1983). Contracts entered into by an Indian tribe and approved by the Secretary are subject to the same rules of interpretation applicable to contracts between private parties. White Sands Forest Products, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 299, 303, 90 I.D. 396, 398 (1983). Cf. L. O. Power, 22 IBLA 15, 18 (1975); St. Joe Minerals Corp., 20 IBLA 272, 277 (1975) (both interpreting contracts between the United States and private parties). Federal law, which controls the construction of Federal contracts including Indian contracts, follows the principles of general contract law. Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411 (1947); In re Humboldt Fir, Inc., 426 F. Supp. 292, 296 (N.D. Cal. 1977), aff'd, 625 F.2d 330 (9th Cir. 1980); Walch Logging Co. v. Portland Assistant Area Director, 11 IBIA 85, 98, 90 I.D. 88, 95 (1983).

[2] The primary function of contract interpretation is to ascertain the intent of the parties. ITT Arctic Services, Inc. v. United States, 524 F.2d 680, 684 (Ct. Cl. 1975); Alaska Pipeline Co., 38 IBLA 1, 15 (1978); 4 S. Williston, A Treatise On The Law Of Contracts § 601 (3d ed. 1961). The rules governing contract interpretation are well settled:

> In attempting to give effect to the contracting parties' intent, the court is guided by the principles that "[t]he parties' intent must be gathered from the instrument as a whole[,]" preferably giving a reasonable meaning to all parts of the instrument rather than leaving a portion of it useless, from the perspective of "a reasonably intelligent person acquainted with the contemporary circumstances[,]" and ascribing to the contract language "its ordinary and commonly accepted meaning," without twisted or

> strained out of context analysis, or regard to the subjective unexpressed intent of one of the parties. [Citations omitted.]

ITT Arctic Services, Inc. v. United States, supra. See Alaska Pipeline, supra. If the principal purpose of the parties in entering into the agreement is ascertainable, that purpose is given great weight in interpreting the contract. Restatement (Second) of Contracts § 228 (1981).

Both ASARCO and MMS have espoused plausible interpretations of paragraph V.A(5) of the Settlement Agreement in light of the words used in that paragraph. Nevertheless, we find that MMS' interpretation comports more fully with the underlying purpose of that paragraph.

The parties included paragraph V.A(5) in the Settlement Agreement to clarify that the minimum royalty provisions of the agreement did not supersede the minimum royalty provisions in the leases. Absent this language, the Settlement Agreement could reasonably have been construed to mean that the lease minimum royalty provisions were no longer effective, and that the only minimum royalties due would be those required by the agreement. Paragraph V.A(5) clearly reinforced the vitality of the leases' minimum royalty provisions by establishing that the minimum royalty provisions of the Settlement Agreement were supplemental to, and not a substitution for, the leases' minimum royalty requirements.

MMS' construction of paragraph V.A(5), which requires that the total minimum royalties under each lease ($10,217.48) be added to the total minimum royalties under the Settlement Agreement ($600,000) before subtract-ing the production royalties paid to determine the minimum royalty due, effectuates the purpose of that paragraph. The amount of minimum royal-ties remains constant under MMS' understanding of the paragraph. On the other hand, ASARCO's interpretation provides for minimum royalties of $610,217.48, if there is no production from the leases; however, where there is production, if the actual royalty paid is less than the lease minimum royalty, total minimum royalties would be less than $610,217.48. Under that construction, minimal production will render the lease minimum royalty provisions inoperative contrary to the purpose of paragraph V.A(5), and reduce the total amount of minimum royalties payable to the Papagos. ASARCO has not convinced us that the parties intended that less minimum royalties would be due if some production occurred than if no production occurred.

The submissions by the parties indicate that ASARCO and the Papagos apparently had different understandings of the meaning of paragraph V.A(5) from its inception. The courts have held that "where there is a mutual misunderstanding as to a contract term * * *, the court will rule against the party bearing the burden of proof." United Steelworkers of America v. North Bend Terminal Co., 752 F.2d 256, 261 (6th Cir. 1985). In this case, ASARCO, as the party appealing the Deputy's decision, has the burden of proving that decision is erroneous. E.g., Wells J. Horvereid, 88 IBLA 345, 348 (1985); In re Pacific Coast Molybdenum Co., 75 IBLA 16, 22, 90 I.D. 352, 356 (1983) (decision issued by Department official pursuant to delegated authority is presumptively valid and appellant must establish that the decision is wrong). This it has failed to do. We therefore conclude

that MMS correctly construed paragraph V.A(5) and affirm the decision requiring the payment of additional minimum royalties.

ASARCO offers no specific reasons for challenging the assessments of late payment charges other than its assertion that the underlying royalties were not due. MMS contends that because the additional minimum royalties were properly calculated, the interest is also due, citing 30 CFR 218.200 (1986). 6/ We agree with MMS. Because we have found that ASARCO was properly required to pay the additional minimum royalties, the decisions requiring ASARCO to pay interest must also be affirmed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Bruce R. Harris
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

6/ That regulation was redesignated effective July 27, 1987, as 30 CFR 218.202. 52 FR 23815 (June 25, 1987).

APPENDIX A

MMS calculated underpaid minimum royalties for the two leases, as follows:

LEASE 454-2-60

MINIMUM ROYALTIES

LEASE YEAR	PER SETTLEMENT AGREEMENT	PER TERMS OF LEASE	TOTAL	ACTUAL ROYALTIES PAID	UNDERPAID MINIMUM ROYALTY
79-80	300,000.00	2,240.00	302,240.00	390,946.40	0.00
80-81	300,000.00	2,240.00	302,240.00	300,000.00	2,240.00
81-82	300,000.00	2,240.00	302,240.00	300,000.00	2,240.00
82-83	300,000.00	2,240.00	302,240.00	300,000.00	2,240.00
83-84	300,000.00	2,240.00	302,240.00	300,000.00	2,240.00

Underpaid Minimum Royalties for Lease 454-2-60 $8,960.00

LEASE 454-3-60

MINIMUM ROYALTIES

LEASE YEAR	PER SETTLEMENT AGREEMENT	PER TERMS OF LEASE	TOTAL	ACTUAL ROYALTIES PAID	UNDERPAID MINIMUM ROYALTY
79-80	300,000.00	7,977.48	307,977.48	497,056.54	0.00
80-81	300,000.00	7,977.48	307,977.48	300,000.00	7,977.48
81-82	300,000.00	7,977.48	307,977.48	300,000.00	7,977.48
82-83	300,000.00	7,977.48	307,977.48	300,000.00	7,977.48
83-84	300,000.00	7,977.48	307,977.48	300,000.00	7,977.48

Underpaid Minimum Royalties for Lease 454-3-60 $31,909.92